

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF REVENUE**

In the Matter of)	
)	
C A. A)	
)	OAH No. 11-0457-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-041-7010

DECISION

I. Introduction

C A. A’s application for a 2011 permanent fund dividend (PFD) was denied because he was incarcerated during the qualifying year, 2010, as a result of his third misdemeanor conviction. Following an unsuccessful informal appeal, Mr. A requested a formal appeal by correspondence. The parties were provided an opportunity to submit additional argument or evidence. The division submitted its Formal Hearing Position Statement. Mr. A requested the record remain open, and while his request was granted in part,¹ he did not submit any evidence beyond what he had already provided with his application for formal appeal. Because Mr. A was incarcerated in the qualifying year, 2010, as a result of a disqualifying conviction, he is not eligible to receive the 2011 PFD.

II. Facts

Mr. A timely applied for a 2011 PFD. The division has raised no issue regarding Mr. A’s eligibility apart from his incarceration during the qualifying year, 2010.

This is not Mr. A’s first challenge to the division’s denial of his PFD for a disqualifying incarceration during the qualifying year. In 2010, the division determined Mr. A was ineligible for a 2010 PFD for the same reason it denied his 2011 PFD. In that appeal, Mr. A did not dispute that he was incarcerated up to June 4, 2010 or that he has three misdemeanor convictions in Alaska:

Case No.	Charge/Conviction Date
4FA-01-XXXXXCR	DWI ² 00/00/02
4FA-04-XXXXXCR	DWLC/S/R/L ³ 0/00/05
4FA-05-XXXXXCR	DWI 00/00/06 DWLC/S/R/L 0/00/06

¹ Mr. A requested the matter be continued several months. Administrative Law Judge Handley did not grant the full request, but rather agreed to keep the record open for an additional 30 days. The record closed on February 17, 2012. January 3, 2012 Order.

² Driving While Intoxicated (DWI).

³ Drive While License Canc/Susp/Revoked/Limited (DWLC/S/R/L).

Rather, he argued that the incarceration was not the result of his third misdemeanor offense, but that it was for a previously dismissed charge.⁴

As in this case, the record was left open to provide Mr. A with an opportunity to supplement the record but, also as here, he failed to take advantage of the additional time. In the written decision denying his 2010 PFD application, it was found that:

On April 19, 2010, Mr. A was arrested and remained incarcerated through June 4, 2010 under the sentence imposed in [4-FA-05-XXXXXCR]. A review of the Department of Correction's Time Accounting Record establishes that Mr. A was released on June 4, 2010 after receiving a reduction for good time and credit for the time served . . .⁵

Here, in support of this appeal, Mr. A writes that he was not incarcerated, but does not identify whether that statement is for 2010 or 2011.⁶ Other than his assertions in support of his 2011 informal and formal appeal requests, he has presented no corroborating evidence that he was not incarcerated in 2010.

III. Discussion

The Alaska legislature has directed that “an individual is not eligible for a permanent fund dividend for a dividend year when . . . during all or part of the qualifying year, the individual was incarcerated as a result of the conviction in this state of a . . . misdemeanor if the individual has been convicted of . . . (i) a prior felony as defined in AS 11.81.900; or (ii) two or more prior misdemeanors as defined in AS 11.81.900.”⁷ The statute counts prior convictions for criminal offenses committed on or after January 1, 1997.⁸

The qualifying year for a 2011 dividend was 2010.⁹ Mr. A has been convicted of three misdemeanors since January 1, 1997. Therefore, if his 2010 incarceration was the result of the third misdemeanor conviction, he would disqualify himself from a 2011 dividend. The sole question in this appeal is whether the record supports a finding that Mr. A's incarceration in 2010 was the result of a third misdemeanor conviction. As the individual challenging the

⁴ *In re A*, OAH No. 10-0540-PFD at 1 (February 22, 2011).

⁵ *In re A*, OAH No. 10-0540-PFD at 3 (February 22, 2011).

⁶ Exhibit 3 at 2; Exhibit 5 at 2. Individuals often confuse the qualifying year with the dividend issue year.

⁷ AS 43.23.005(d). The two definitions from Title 11 simply specify that misdemeanors are crimes for which sentences greater than one year cannot be imposed, while felonies are crimes for which such sentences can be imposed.

⁸ Sec. 6 ch. 46 SLA 1996.

⁹ AS 43.23.095(6).

division's decision, it is Mr. A's burden to establish that it is more likely than not that he is eligible for a 2011 PFD.¹⁰

Mr. A has failed to meet his burden. Mr. A asserts that he was not in jail, but does not indicate whether that statement applies to 2011 or 2010. Even if it were accepted that the statement was a denial of incarceration in 2010, it is unsworn and self-serving.¹¹ Mr. A's written claim is insufficient to prove it is more likely than not that his incarceration was not disqualifying. Therefore, his appeal of the division's decision to deny his application for a 2011 PFD should be affirmed.

IV. Conclusion

Mr. A's incarceration in 2010 was, more likely than not, attributable to his third misdemeanor conviction in Case No. 4FA-05-XXXXXCR. Therefore, he is not eligible to receive a 2011 PFD because of his incarceration during the qualifying year as a result of a third misdemeanor conviction since January 1, 1997. The decision of the division is AFFIRMED.

DATED this 11th day of June, 2012.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

¹⁰ 15 AAC 05.030(h).

¹¹ Because the prior decision addressed whether he was incarcerated in 2009, it could be argued that collateral estoppels would not apply because the issue to be precluded from re-litigation must be identical to that decided in the first action. *Harrod v. Department of Revenue*, 255 P.3d 991, 999 (Alaska 2011). Here the issue is whether Mr. A was incarcerated in 2010. This is a different issue, and therefore as to incarceration in 2010, while the prior decision is persuasive, it is not entitled to preclusive effect. The factual finding in regarding incarceration in 2010 is, however, persuasive.

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of July, 2012.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication.]